Nos. 76-1380 and 76-1390

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS ARADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RAYMOND T. ADAMS, ET AL., PETITIONERS

v.

CITY OF CHICAGO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

FRANK D. ALLEN, JR.,
MARIE E. KLIMESZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Statement 2

Argument 5

Conclusion 12

CITATIONS

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 ..... 8, 10

Comstock v. *Group of Institutional Investors*, 335 U.S. 211 8

Dothard v. *Rawlinson*, No. 76-422, decided June 27, 1977 7

Duignan v. *United States*, 274 U.S. 195 7

Fitzpatrick v. *Bitzer*, 427 U.S. 445 10

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 10

General Electric Co. v. *Gilbert*, 429 U.S. 125 5

Griggs v. *Duke Power Co.*, 401 U.S. 424 ..... 5, 8

Hazelwood School District v. *United States*, No. 76-255, decided June 27, 1977 ..... 6, 7

Kirkland v. *New York State Department of Correctional Services*, 520 F. 2d 420 11

Louisiana v. *United States*, 380 U.S. 145 10

Page

Cases--continued:

National League of Cities v. *Usery*, 426 U.S. 833 6

Northeast Construction Co. v. *Romney*, 485 F. 2d 752 11

Oregon v. *Mitchell*, 400 U.S. 112 6

South Carolina v. *Katzenbach*, 383 U.S. 301 6

Swann v. *Board of Education*, 402 U.S. 1 11

United States v. *Intern. Union of Elevator Constructors*, 538 F. 2d 1012 11

Usery v. *Allegheny County Institution District*, 544 F. 2d 148, certiorari denied, No. 76-1010, March 28, 1977 6

Washington v. *Davis*, 426 U.S. 229 8

Constitution, statutes, and regulations:

United States Constitution, Fourteenth Amendment 2, 6, 7

Civil Rights Act of 1964, Title VII, 78 Stat. 253 *et seq.*, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.* 2

State and Local Fiscal Assistance Act of 1972, 86 Stat. 932, 31 U.S.C. (Supp. V) 1242, as amended by Pub. L. 94-488, 90 Stat. 2350, 2354 2,7

90 Stat. 2354, 31 U.S.C. 1242(g) 7

42 U.S.C. 1981 2

42 U.S.C. 1983 2

28 C.F.R. 42.201 *et seq.* 2

28 C.F.R. 42.301 *et seq.* 2

Page

Constitution, statutes, and regulations—continued:

29 C.F.R. 1607.5(b)(1) 9

29 C.F.R. 1607.5(b)(3) 9

29 C.F.R. 1607.5(b)(5) 9

29 C.F.R. 1607.5(c)(1) 9

29 C.F.R. 1607.5(c)(2) 9

Miscellaneous:

118 Cong. Rec. 1661-1676 (1972) 11

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 5

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1380

LOUIS ARADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 76-1390

RAYMOND T. ADAMS, ET AL., PETITIONERS

v.

CITY OF CHICAGO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Arado Pet. App. A1-A61;[1] Adams Pet. App. 1-61)[2] is reported at 549 F. 2d 415. The final opinion and order of the district court (Arado Supp. Pet. App. A99-A158)[3] are reported at 411 F. Supp.

---

[1] "Arado Pet. App." refers to the appendix to the petition in No. 76-1380.

[2] "Adams Pet. App." refers to the appendix to the petition in No. 76-1390.

[3] "Arado Supp. Pet. App." refers to the "Supplementary Appendix" to the petition in No. 76-1380.

218. The opinion of the district court on the preliminary injunction is reported at 385 F. Supp. 543. Later orders of the court of appeals (Adams Pet. App. 63-68) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1977. A petition for a writ of certiorari was filed in No. 76-1380 on April 8, 1977, and in No. 76-1390 on April 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly held that use of a promotional examination for the position of sergeant in the Chicago Police Department that had a disparate impact on minority applicants and was not shown to be a reliable indicator of job performance violated Title VII of the Civil Rights Act of 1964.

2. Whether a remedial order requiring the City of Chicago to attempt to achieve long-term goals by meeting short-term requirements for the promotion of qualified blacks, Spanish-surnamed persons, and women to the rank of sergeant is an appropriate remedy under Title VII.

3. Whether the court of appeals erred in denying untimely petitions for intervention for the purpose of seeking review of portions of its decision on relief.

STATEMENT

The United States initated this suit on August 14, 1973, pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*,[4] against the City of Chicago, the Chicago

[4]The complaint also alleged violations of the Fourteenth Amendment; 42 U.S.C. 1981 and 1983; the nondiscrimination provision of the State and Local Fiscal Assistance Act of 1972, 86 Stat. 932, 31 U.S.C. (Supp. V) 1242, as amended by Pub. L. 94-488, 90 Stat. 2350, 2354; and regulations and guidelines of the Department of Justice and the Law Enforcement Assistance Administration, 28 C.F.R. 42.201 *et seq.*, subpart D, and 28 C.F.R. 42.301 *et seq.*, subpart E.

Civil Service Commission, and the Superintendent of Police, alleging a pattern or practice of discrimination against blacks, Hispanics, and women in hiring, assignment, promotion, and discipline within the Chicago Police Department.[5]

The United States sought a preliminary injunction and in a Memorandum Opinion, dated November 7, 1974, the district court held that the United States had established a *prima facie* case of discrimination based upon the racially disproportionate impact of the testing procedure used to make appointments to the position of sergeant[6] and that the defendants failed to prove that the 1973 examination had a demonstrable relationship to successful performance as a sergeant (385 F. Supp. at 560). Further promotion from eligibility rosters based upon the 1973 examination were enjoined. Because there was apparently a serious shortage of supervisory personnel, however, the district court subsequently allowed the City to appoint 175 patrolmen to positions as temporary sergeants.[7]

[5]The suit was consolidated with two other pending suits by black and Hispanic persons challenging the employment practices of the police department. Other aspects of the procedural history of the case are cited in the opinion of the court of appeals (Arado Pet. App. A1-A7).

[6]The district court made limited findings as to the 1968 sergeant's examination. While blacks constituted 19.1 percent of the persons taking that examination, only 10 percent of the persons promoted on the basis of that test were black. 385 F. Supp. at 550. The district court also found that the procedure used for hiring patrolmen, including a written examination and background investigation, had a racially disproportionate effect and was not shown to be valid under Title VII and that the police department had discriminated against women in hiring. 385 F. Supp. at 555-557.

That decision was upheld in an interlocutory appeal taken by the Arado intervenors (Petitioners in No. 76-1380), a group of incumbent patrolmen who held top positions on the 1973 eligibility list for promotion to sergeant.

Trial on the merits began on March 10, 1975. In its memorandum decision (January 5, 1976; Arado Supp. Pet. App. A99-A145) the district court reaffirmed its findings made in support of the preliminary injunction, and in its final decree (February 2, 1976) permanently enjoined the use of the eligibility list based on the 1973 sergeant's examination (Arado Supp. Pet. App. A150). In order to remedy the present effects of the past discrimination, the court ordered the City defendants to "adopt and seek to achieve a goal of promoting blacks, Spanish-surnamed persons and females to the rank of sergeant so as to have and maintain a sergeant mix reasonably representative of the patrol force" (Arado Supp. Pet. App. A154). The court also ordered that (*ibid.*):

> To insure as quickly as practicable the attainment of this goal, 40% of the promotions to the rank of sergeant shall consist of black and Spanish-surnamed persons, subject to the availability of qualified applicants, until further order of the court.

Finally, the district court authorized the City defendants to make the 175 temporary appointments permanent (Arado Supp. Pet. App. A154).

The court of appeals "on an independent review of the record" affirmed. "We find the court's factual findings to be supported by substantial evidence and hold that the disparity produced by the combination of these components is enough to establish [an unrebutted] *prima facie* case that the Department's employment practices were discriminatory in violation of Title VII" (Arado Pet. App. A15). The court of appeals also held that the fixed percentage requirements were not an abuse of discretion, but "were necessary in view of the City's recalcitrance in voluntarily taking steps to correct the racial and sexual imbalances within the Police Department" (Arado Pet.

App. A32). The court vacated the portion of the order which permitted the City to make permanent the temporary promotions to sergeant (*id.* at A36).[8]

After the issuance of the mandate, the petitioners in No. 76-1390 (hereinafter "the Adams petitioners"), representing the class of persons who had been given the temporary promotions, filed a petition in the court of appeals to recall the mandate, for intervention, and for reconsideration. The court of appeals denied the petition and other subsequent requests for similar relief.[9]

ARGUMENT

1. The Arado petitioners contend that unlawful discrimination by an agency of state government under Title VII cannot be shown "without proof of purposefully discriminatory acts" (Arado Pet. 2, 6). In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, this Court emphasized that the thrust of Title VII was directed "to the consequences of employment practices, not simply the motivation." See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 136-137. Congress repeatedly indicated its approval of the *Griggs* rationale during its consideration of the 1972 Amendments to Title VII. See, *e.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess. 5, 14 (1971). Congress also explicitly expressed its intent to afford employees of local governments "the same benefits and protections in equal employment as the employees in the private sector of the economy." S. Rep. No. 92-415, *supra*, at 9.

---

[8] The City of Chicago did not file a petition for a writ of certiorari, but has filed a brief in No. 76-1380 which is styled Brief of Respondents City of Chicago, et al., in Support of Granting a Writ of Certiorari (hereafter Chicago Brief).

[9] The Adams petitioners also filed a request for *en banc* reconsideration of that petition and a petition for intervention for the purpose of filing and/or opposing a petition for a writ of certiorari. Both petitions were denied. On March 11, 1977, they filed an unsuccessful petition in the district court for emergency relief and for leave to intervene. The denial of that petition was affirmed on appeal, No. 77-1387 (C.A. 7), June 21, 1977.

Congress' enlarged power under the Civil War Amendments and its authority to choose appropriate means to secure the protections of the Fourteenth Amendment have been repeatedly recognized by this Court. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445; *South Carolina* v. *Katzenbach*, 383 U.S. 301; *Oregon* v. *Mitchell*, 400 U.S. 112. The application of the full Title VII remedy to the states does not interfere with any attribute of state sovereignty and is an appropriate exercise of congressional power based upon a factually supported determination of need. See Brief for the United States in *Hazelwood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 54-58.[10]

---

[10]Contrary to petitioners' suggestion (Arado Pet. 7), the decision of this Court in *National League of Cities* v. *Usery*, 426 U.S. 833, does not indicate that public and private employers should be subject to different substantive standards under Title VII. In *National League*, this Court held that there were certain attributes of state sovereignty that are constitutionally insulated from congressional exercise of the commerce power. Title VII, although having a basis in the commerce power, provides a remedy in situations where it is alleged that the state has violated its obligation under the Fourteenth Amendment not to discriminate on the basis of race or other improper criteria. Recognizing this difference, most federal courts have concluded that the portions of the Fair Labor Standards Act that have a basis in the Fourteenth Amendment may be constitutionally applied to the states, even though *National League* struck down those portions of that Act that were based on the commerce power alone. See, *e.g.*, *Usery* v. *Allegheny County Institution District*, 544 F. 2d 148 (C.A. 3), certiorari denied, No. 76-1010, March 28, 1977.

Moreover, Title VII does not involve any interference with the discretion of state and local governments to determine the number of employees they will hire, the functions they will perform, the hours they will work, or the wages they will be paid. The states' ability to determine for themselves the structure and functions of government is unimpaired. Title VII is no more than a proper legislative measure to ensure that states and their subdivisions will not discriminate—subtly or otherwise—on the basis of race or other improper criteria.

In any event, petitioners' contention that absent proof of purposeful discrimination Title VII is not an appropriate exercise of congressional power over state and local governments (Arado Pet. 6-8)[11] was not advanced in either court below and therefore is not properly presented here.[12] See, *e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200.

2. Petitioners claim that the district court's application of Equal Employment Opportunity Commission Guidelines established an irrebuttable presumption of unlawful discrimination based upon the disproportionate performance of black and white police officers in taking the 1973 sergeant's examination (Arado Pet. 10-15). However, no irrebuttable presumption was imposed; petitioners simply failed to meet accepted standards for test validation. As the court of appeals stated, "[t]he district court found that the validity studies offered by defendants failed to comply with the requirements of the EEOC guidelines and APA [American Psychological Association] Standards for test validation and that defendants' experts failed to establish that any of the selection and promotion devices

---

[11]This Court has declined on two recent occasions to consider this question, once because it was not raised in the district court (*Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 1, n. 1) and once because the issue was not squarely framed by the facts (*Hazlewood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 6-8, n. 12).

[12]In addition, since the decision is based in part upon violations of the non-discrimination provision of the State and Local Fiscal Assistance Act of 1972, 86 Stat. 932, 31 U.S.C. (Supp. V) 1242, as amended by Pub. L. 94-488, 90 Stat. 2350, 2354, and the power of Congress to place reasonable restrictions upon the use of federal funds by the recipients, the outcome of this case probably would not depend upon the resolution of the Fourteenth Amendment issue raised by petitioners. See 90 Stat. 2354, 31 U.S.C. 1242(g).

were demonstrably job related" (Arado Pet. App. A-18). The court of appeals upheld the district court's findings (*id.* at A-19), and further review is not warranted, since "[a] seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214.

There is no colorable showing of exceptional error here. The propriety of utilizing Equal Employment Opportunity Commission guidelines was recognized by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 431. These guidelines are entitled to deference; they reflect the holding of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, that "employment tests that are discriminatory in effect" are prohibited under Title VII unless they have " 'a manifest relationship to the employment in question.' " *Albermarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425.

Here, petitioners' evidence failed to satisfy the basic professional standards of any recognized method of employment test validation.[13] Petitioners rely upon a study

[13]Although the Arado petitioners argue that the examination has "construct validity" (Arado Pet. 12-13), the evidence introduced in the district court related solely to criterion-related validity and content validity (Arado Pet. App. A24-A25). Contrary to the City's assertion (Chicago Brief 8-10), the courts below did not require that any particular method of validation be used. Instead, both courts found that the defendants failed to demonstrate the validity of the sergeant's examination under either of the methods upon which they chose to introduce evidence.

This Court referred to the professional standards of the American Psychological Association, which the Guidelines endorse, for definitions of basic methods of test validation. *Washington* v. *Davis*, 426 U.S. 229, 247, n. 13. As described there, criterion-related validity is demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified. Content validity is demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant.

conducted for purposes of this litigation by the Director of the City's Civil Service Commission that is claimed to demonstrate criterion-related validity. The district court found, however, that the sample group of incumbent sergeants to whom the examination was administered were not representative of the candidates for the position, 29 C.F.R. 1607.5(b)(1), that the criterion chosen by the city with which performance on the examination was to be correlated was not itself a reliable indicator of job performance,[14] 29 CFR 1607.5(b)(3) and (c)(1), and that results of the study did not show a statistical or practical significance between performance on the written examination and performance on the job, especially for minority individuals, 29 C.F.R. 1607.5(b)(5), (c)(1) and (c)(2). 385 F. Supp. 543, 559; Arado Supp. Pet. App. A131-A132. These findings were upheld by the court of appeals.

Similarly, the district court found that the content validity claim was seriously undermined because the average successfully performing incumbent sergeant could not answer correctly 47 percent of the questions on the test and would not have made the cut-off point on the 1973 promotional list. 385 F. Supp. at 558 n. 9, 559. The court of appeals, in affirming, held (Arado Pet. App. A27) that the district court could properly conclude "that the evidence of the poor performance of incumbent sergeants on the examination * * * demonstrated that it was not content valid."

The decisions below correctly applied recognized Title VII principles, and petitioners have shown nothing in these factual determinations that would warrant this Court's review.

[14]The district court also based its decision upon the credibility of the defendants' witnesses and statistical studies (see Arado Supp. Pet. App. A127-A130). The court of appeals found those assessments to be supported by the record (Arado Pet. App. A26).

3. The Arado petitioners argue (Pet. 8-10) that the relief ordered by the district court and affirmed by the court of appeals is not authorized by Title VII.

As this Court has consistently recognized, the district court has not merely the power but the duty to render a decree in cases of racial discrimination which will so far as possible eliminate the effects of the past discrimination as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154; *Albemarle*, *supra*, 422 U.S. at 418; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770.

Having found that the defendants had engaged in discrimination under Title VII against blacks, Spanish-surnamed persons, and women in hiring and promotion, the district court framed a decree closely tied to the effects of past discrimination, limited in time, and flexible in its substantive requirements. While the relief is designed to establish and "maintain a sergeant mix reasonably representative of the patrol force" (Arado Supp. Pet. App. A154), it does not require the city defendants to promote anyone who is unqualified or to promote a person less qualified under valid qualification standards. The requirement that 40 percent of the promotions to sergeant go to black and Spanish-surnamed persons is only an interim step, and the court has demonstrated its willingness to alter the numerical requirements imposed by its decree in response to proposals involving non-discriminatory employment standards. For example, in a post-decree order issued September 7, 1976 (420 F. Supp. 733), the district court suspended the hiring (as opposed to promotion) goals required by the final decree and permitted the City to use, in lieu thereof, the results of a new selection device that was shown to have little impact against minorities and that is presently the subject of an ongoing predictive validation

study. The long-term goal is similarly flexible, requiring only that the sergeant ranks be "reasonably representative" (Arado Supp. Pet. App. A154) of the patrol force in race, national origin, and sex. See *Swann* v. *Board of Education*, 402 U.S. 1, 25.

The district court imposed numerical relief here reluctantly, and only after the City failed to devise its own remedy as the court had suggested in its preliminary injunction order in November, 1974 (Arado Supp. Pet. App. A137). The imposition of limited and flexible numerical requirements in the context of the particular factual circumstances present here was well within the discretion of the district court and does not warrant further review.[15]

---

[15]In enacting the 1972 Amendments to Title VII, Congress expressly considered the issue of numerical relief under Title VII and rejected attempts to limit the authority of courts to award such relief to remedy the effects of past discrimination. See 118 Cong. Rec. 1661-1676 (1972); *United States* v. *Intern. Union of Elevator Constructors*, 538 F. 2d 1012, 1019-1020 (C.A. 3).

As the petitioners concede (Arado Pet. 10 and cases cited in footnote), the courts of appeals that have considered this issue have approved of the use of numerical goals in shaping a remedy for past discrimination.

The decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420 (C.A. 2), relied upon by the City as creating a conflict among the circuits on this issue (Chicago Brief 7-8) did not involve a Title VII claim. No conflict among the circuits is asserted in the Arado petition. In addition to the cases cited by petitioners, cf. *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (C.A.D.C.).

4. The Adams petitioners seek review of the court of appeals' refusal to permit the city defendants to make the temporary appointments to the rank of sergeant permanent. The court of appeals denied motions by these petitioners for leave to intervene in this litigation that were made after issuance of the mandate, including motions requesting leave to intervene for the purpose of filing this petition (see discussion *supra*, n. 9). The decisions of the courts below denying these petitioners' tardy motion for leave to intervene after the trial of the case, the appellate proceedings, and the issuance of the mandate were well within their discretion and do not warrant review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

FRANK D. ALLEN, JR.,
MARIE E. KLIMESZ,
Attorneys.

AUGUST 1977.

DOJ-1977-08